IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM [illegible]

STATE OF NEW JERSEY,

Petitioner,

vs.

LEROY HOWARD,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION
TO THE PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

WARREN H. FAULK, ESQUIRE
BROWN & CONNERY
360 Haddon Avenue
P.O. Box 539
Westmont, New Jersey 08108
(609) 854-8900

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Does the decision of the court below barring Respondent's retrial on the basis of the standards set forth in N.J.S.A. 2C:1-9d constitute adequate and independent state statutory grounds which preclude this Court from granting the Writ sought by Petitioner?

2. Do federal double jeopardy principles bar the retrial of Respondent where there was no necessity at all for the declaration of a mistrial and where the mistrial was sought by the State in order to buttress its evidence and obtain a more favorable opportunity to convict?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES. iii

CONSTITUTIONAL PROVISIONS and STATUTES INVOLVED v

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 7

ARGUMENT:

I. THE DECISION OF THE COURT BELOW IS BASED UPON ITS INTERPRETATION AND APPLICATION OF THE PROVISIONS OF N.J.S.A. 2C:1-9, THEREBY CONSTITUTING ADEQUATE AND INDEPENDENT STATE LAW GROUNDS WHICH PRECLUDE THIS COURT FROM GRANTING THE PETITION. 8

II. EVEN WHEN JUDGED BY FEDERAL DOUBLE JEOPARDY PRINCIPLES, THE DECISION BELOW DOES NOT CONFLICT WITH THOSE PRINCIPLES OR WITH ANY DECISIONS OF THIS COURT OR THE COURTS OF APPEALS 13

CONCLUSION. 27

TABLE OF AUTHORITIES

CASES	PAGE
Arizona v. Washington, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978)	passim
Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)	8, 9
Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)	18
Gori v. United States, 367 U.S. 364, 81 S. Ct. 1523, 6 L. Ed. 2d 1901 (1961), reh. den. 368 U.S. 70, 82 S. Ct. 25 (1961)	12, 13 16, 21
Herb v. Pitcairn, 324 U.S. 117, 65 S. Ct. 459, 89 L. Ed. 789 (1945)	11
Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2nd 1201 (1983)	11, 12
Oregon v. Kennedy, 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982)	16
State v. Farmer, 48 N.J. 145, 224 A.2d 481 (1966), cert. den. 386 U.S. 991, 87 S. Ct. 1305 (1967).	8
State v. Locklear, 16 N.J. 232, 108 A.2d 436 (1954).	9
United States v. Bristol, 325 A.2d 183 (D.C. App. 1974)	18
United States v. Dinitz, 424 U.S. 600, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976).	12, 13 15, 16
United States v. Jorn, 403 U.S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971).	15, 16
United States v. Pridgeon, 462 F.2d 1094 (5th Cir. 1972).	13, 16
United States v. Sedgwick, 345 A.2d 465 (D.C. App. 1977), cert. den. 425 U.S. 966 (1976)	13, 17 18

TABLE OF AUTHORITIES (CONT'D)

PAGE

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 97 S. Ct. 2849, 53 L. Ed. 2nd 965 (1977) 1

CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment V. 8
United States Constitution, Amendment XIV. 9
New Jersey Constitution (1947), Article I, para. 11. 8

UNITED STATES STATUTES:

28 *U.S.C.* sec. 1257. 1

NEW JERSEY STATUTES:

N.J.S.A. 2C:1-9. . . . . passim
N.J.S.A. 2C:1-10 8
N.J.S.A. 2C:1-11 8
N.J.S.A. 2C:1-12 8

RULES OF THE SUPREME COURT OF THE UNITED STATES:

Rule 10. 19

NEW JERSEY COURT RULES:

Rule 2:12-4 24

OTHER AUTHORITIES:

Model Penal Code, 10 *Uniform Laws Annotated*, sec. 1.08 (1974). 9

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

As set forth in Point I infra, Respondent disagrees with Petitioner's contention that this case involves the Double Jeopardy Clause of Amendment V or Amendment XIV, Section 1 to the United States Constitution. Rather, it is the position of Respondent that the decision below involves only the provisions of *N.J.S.A.* 2C:1-9 set forth below.

2C:1-9. **WHEN PROSECUTION BARRED BY FORMER PROSECUTION FOR THE SAME OFFENSE**

> A prosecution of a defendant for a violation of the same provision of the statutes based upon the same facts as a former prosecution is barred by such former prosecution under the following circumstances:
>
> * * *
>
> d. The former prosecution was improperly terminated. Except as provided in this subsection, there is improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the jury was impaneled and sworn....Termination under any of the following circumstances is not improper:
>
> > (1) The defendant consents to the termination or waives, by motion to dismiss or otherwise, his right to object to the termination.
> >
> > * * *
> >
> > (3) The trial court finds that the termination is required by a sufficient legal reason and a manifest or absolute or overriding necessity.

STATEMENT OF THE CASE

On December 30, 1975 Wilma Wilson was shot and killed in he home. *Pet. App. B* at 2b. Present in the house at the time was her son, Samuel, age 5. *Id.* Respondent, then 16 years of age, was arrested and charged as a juvenile with the murder based upo an alleged identification by five-year old Samuel. *Id.*

Two weeks later, on the motion of the State, a hearing was held in Juvenile and Domestic Relations Court to determine if Respondent should be held for indictment and tried as an adult. Id. At this hearing the State attempted to present identification testimony by Samuel. A challenge was made to Samuel's competency to testify and, after Samuel allegedly identified Respondent, the juvenile court ruled that Samuel lacked the requisite capacity to be a witness. *Id.* at 3b. Specifically, the court found:

> ...I cannot be sure to a moral certainty that the boy does not know either the importance of what he is saying or the importance of giving the right testimony rather than the wrong testimony. I cannot say to any degree of certainty that he is unduly subject to suggestion because I know of no way of measuring this. But the matter under consideration is far too serious for the Court to guess as to firstly, whether he knows what he is saying and secondly, the importance of saying only the truth. My personal information is, he does know what he is saying but I cannot say to a degree of certainty that he knows what will happen to him either in this world or the next if he should willfully or unwittingly tell an untruth. I, therefore, am reluctantly persuaded to the conclusion that this testimony should not be accepted.
>
> *Id.*

Based on this finding, the Court entered an Order declaring that Samuel Wilson "is incompetent to be a witness in any hearing, trial or proceeding relating to the death of Wilma Jean Wilson...."

The juvenile court nevertheless referred the matter to the Law Division so that an indictment could be sought against Respondent as an adult. *Id*. Respondent appealed from this referral.

While the appeal was pending, Respondent voluntarily underwent a polygraph examination by the chief polygrapher for the Gloucester County Prosecutor's Office, who concluded that Respondent was "telling the truth as to his denial of participating in or having knowledge of the...crime."

Also while the appeal was pending, the State presented the matter to a grand jury, which declined to indict Respondent. *Id*. Respondent's appeal was therefore dismissed as moot.

Six years later Respondent was rearrested and recharged with the murder of Wilma Jean Wilson. In October of 1984 Respondent, after waiving juvenile court jurisdiction, was indicted for murder and felony-murder and pleaded not guilty to the indictment.

After three years of pretrial proceedings punctuated by numerous motions and one appeal by the State, and almost 13 years after the murder, this case was finally called for trial. *Id*. Jury selection initially took place on October 24, 1988. Sixteen

jurors were chosen (but not sworn) and were instructed to return to hear the evidence on November 4, 1988. On November 4th, three of the chosen jurors were excused for valid reasons and a new jury panel was summoned to fill these vacancies.

During the course of its voir dire of this new panel, in anticipation of questioning the panel regarding whether the 13 year delay would affect any juror's ability to fairly judge the case, the trial court remarked that the jurors would be "satisfied as to the explanation of the delay." *Id.* at 4b. The prosecutor raised a concern about this remark, and the trial court immediately clarified its statement by telling the jury that neither the State nor the defendant was required to justify the delay. *Id.* at 5b. The trial judge directly questioned the jurors as to whether the delay would have any impact whatsoever on their ability "to fairly judge the defendant and the State in this matter." *Id.* No juror responded affirmatively and so the court then asked counsel if "that covers it." *Id.* Both defense counsel and the prosecutor acknowledged that the court's clarification effectively disposed of the matter. *Id.* at 6b.

After the vacancies had been filled and the jury sworn, the trial judge addressed some preliminary instructions to the jury emphasizing the jury's role as judge of the facts and the need to pay close attention to the testimony and evidence. *Id.* In so doing, the court indicated that if during deliberations some jurors had questions regarding some testimony, they would have to rely on their memories. *Id.* The prosecutor expressed some

concern with this remark, contending that it implied that no testimony could be read back. *Id.* at 7b. The trial court replied that any ambiguity created by the remark would be cleared up in the usual instructions at the close of the case, by telling the jury that the court does have discretion to permit some testimony to be reread. *Id.* The prosecutor readily accepted this, thanked the court, and sought no further action by the court. *Id.*

The State then presented its opening statement to the jury, making reference to the fact that Respondent was 16 years old at the time of the murder. Following this, defense counsel commenced his opening. Defense counsel reiterated the prosecutor's reference to Respondent being 16 years of age at the time of the murder and that Respondent's accuser, Samuel Wilson, was then five years old. *Id.* Counsel also made reference to the fact that Respondent had initially been charged as a juvenile and that there was a juvenile court hearing in 1976 shortly after he was charged. *Id.* at 7b-8b.

At this point the prosecutor interrupted counsel's opening and at a sidebar conference asked for an offer of proof as to what counsel was about to say. *Id.* at 8b. Defense counsel informed the court he intended to tell the jury that five-year-old Samuel Wilson had been found incompetent to testify at that hearing. *Id.* The prosecutor acknowledged that the State intended to present testimony regarding Samuel's alleged in-court identification of Respondent during the hearing at which he was

found incompetent. *Id.* at 8b-9b. But the prosecutor nonetheless contended that the incompetency finding was irrelevant and the jury should not be told of it. *Id.* at 9b.

While still at sidebar the trial court ruled that the judicial finding of incompetency was relevant and admissible, and therefore defense counsel could refer to it in his opening. *Id.* Immediately the prosecutor moved for a mistrial. *Id.* After further argument by both the prosecutor and defense counsel, the court denied the State's motion, but granted the State's application for a recess to determine if it wanted to take an immediate appeal from the ruling. *Id.* The trial court also indicated a willingness to grant a stay if the State decided to appeal. *Id.*

When the prosecutor returned from the recess, instead of accepting the court's offer of a stay so an immediate appeal could be taken, he renewed his motion for a mistrial, this time contending that the court's remarks to the jury, along with the evidential ruling and defense counsel's passing reference to the juvenile court hearing, required that the jury be discharged. *Id.*

Despite its prior curative instruction to the jury, and without reversing itself on the evidential ruling it had made before the recess, the court granted the State's motion for a mistrial. *Id.* at 10b. Defense counsel immediately raised the prospect that the mistrial could bar the retrial of Respondent, by moving to dismiss the indictment. *Pet. App. C* at 6c. The

trial court specifically found that there was no "misconduct by the defense....absolutely not", *Id.* at 8c, but nonetheless reaffirmed its decision to grant the State's mistrial motion. *Id.* at 9c. Thereafter the court brought in the jurors and discharged them. *Id.* at 9c - 10c.

An interlocutory appeal was taken from the trial court's denial of Respondent's motion to dismiss the indictment, and a unanimous panel of the New Jersey Superior Court, Appellate Division, ruled that the declaration of the mistrial violated the express provisions of *N.J.S.A.* 2C:1-9d because "there was no necessity at all to declare the mistrial", let alone a "sufficient legal reason and a manifest or absolute or overriding necessity", as required by the statute. *Pet. App. B* at 2b.

The State sought certification of the case from the New Jersey Supreme Court, but on November 1, 1989, the Supreme Court rejected this application. *Pet. App. A*.

SUMMARY OF ARGUMENT

I. The statute governing this Court's jurisdiction, 28 *U.S.C.* sec. 1257, imposes limitations on its authority to review state court decisions. Under the statute, review of a final judgment rendered by the highest court of a state is permitted only where "any title, right, privilege or immunity is... claimed under the Constitution...of the United States." Certiorari review in this case is thus limited to federal constitutional issues.

It is the position of Respondent that the opinion of the court below is clearly based on adequate and independent state statutory grounds, namely *N.J.S.A.* 2C:1-9, the New Jersey statute governing the circumstances under which a subsequent prosecution is barred by a former prosecution. Consequently, there is no federal constitutional issue presented by this case and therefore this Court must deny the State's Petition for a Writ of Certiorari.

II. Even if this Court were to review this case under federal double jeopardy principles, the decision below does not conflict with these principles or with any decisions of this Court or the Courts of Appeals. Consequently, there is no reason for this Court to exercise its discretion in favor of the Petition filed by the State of New Jersey.

ARGUMENT

I. THE DECISION OF THE COURT BELOW IS BASED UPON ITS INTERPRETATION AND APPLICATION OF THE PROVISIONS OF N.J.S.A. 2C:1-9, THEREBY CONSTITUTING ADEQUATE AND INDEPENDENT STATE LAW GROUNDS WHICH PRECLUDE THIS COURT FROM GRANTING THE PETITION.

Although New Jersey citizens are protected against being twice placed in jeopardy by both the Fifth Amendment to the Constitution of the United States, *see Benton v. Maryland*, 395 U.S. 784 (1969), and by Article I, para. 11 of the New Jersey Constitution (1947), *see State v. Farmer*, 48 N.J. 145 (1966), *cert. den.* 386 U.S. 991 (1967), in 1978 the New Jersey Legislature elected to provide its citizens with additional protection by enacting statutory standards governing the circumstances under which a subsequent prosecution is to be barred by a former prosecution. *See N.J.S.A.* 2C:1-9; *N.J.S.A.* 2C:1-10; *N.J.S.A.* 2C:1-11 and *N.J.S.A.* 2C:1-12.

The specific section of the New Jersey Criminal Code at issue in this case is *N.J.S.A.* 2C:1-9, which provides in pertinent part:

> A prosecution of a defendant for a violation of the same provision of the statutes based upon the same facts as a former prosecution is barred by such former prosecution under the following circumstances:
>
> * * *
>
> d. The former prosecution was improperly terminated. Except as provided in this

> subsection, there is improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the jury was impaneled and sworn....Termination under any of the following circumstances is not improper:
>
> > (1) The defendant consents to the termination or waives, by motion to dismiss or otherwise, his right to object to the termination.
> >
> > * * *
> >
> > (3) The trial court finds that the termination is required by a sufficient legal reason and a manifest or absolute or overriding necessity.[1]

As even a cursory review of the opinion below reveals, the New Jersey Appellate Division's decision does not rest on federal constitutional law grounds, but rather is expressly based upon its interpretation and application of state statutory grounds, namely the provisions of *N.J.S.A.* 2C:1-9 set forth above.

At the very outset of its opinion, the Appellate Division framed the issues in the verbatim language of *N.J.S.A.* 2C:1-9 and

---

[1]While *N.J.S.A.* 2C:1-9 was derived in part from the Model Penal Code, *see* 10 *Uniform Laws Annotated*, sec. 1.08 (1974), the specific provisions of the statute requiring "a sufficient legal reason and a manifest or absolute or overriding necessity" to terminate a trial comes not from the Model Penal Code but from New Jersey case law applying the common law doctrine of autrefois acquit. *See State v. Locklear*, 16 N.J. 232, 243 (1954). It is thus apparent that the standard of "sufficient legal reason and a manifest or absolute or overriding necessity" was a well-established part of New Jersey common law jurisprudence long before federal double jeopardy principles were applied to the states through the 14th Amendment in *Benton v. Maryland*, 395 U.S. 784 (1969).

cited solely to the governing subsections of this statute in articulating the issues to be decided:

> The issues are whether defendant had consented or waived objection to the mistrial and if not, whether there was 'sufficient legal reason and a manifest or absolute or overriding necessity' for the judge to have declared the mistrial. *N.J.S.A.* 2C:1-9d (1) and (3).
>
> *Pet. App. B* at 1b-2b.

Immediately after framing the issues in these express statutory terms, the court below set forth its conclusions, again utilizing the "consent" and "necessity" terminology of the statute:

> We conclude that defendant had not consented to the mistrial, that there was no necessity at all to declare the mistrial, and that the order denying defendant's motion for dismissal of the indictment must therefore be reversed.
>
> *Id.* at 2b. [emphasis added].

After reviewing the factual background of the case and the circumstances which led up to the State's motion for a mistrial, the Appellate Division pointed out that the New Jersey standards for declaring a mistrial without thereby barring retrial have been codified in *N.J.S.A.* 2C:1-9d, and then set out in full the relevant portions of the statute on which its decision is based. *Id.* at 11b - 12b. Next, the court below reiterated the two issues to be decided, again utilizing the verbatim language of the statute in stating these issues to be "whether retrial is nevertheless permitted either because defendant consented or

waived his right to object to the mistrial, or because the mistrial was 'required by sufficient legal reasons and a manifest or absolute or overriding necessity.'" *Id.* at 13b.

The opinion then disposed of the waiver or consent issue, citing once again to *N.J.S.A.* 2C:1-9d(1) in deciding that defendant had neither consented to nor waived his right to object to the mistrial. *Id.*

The last portion of the Appellate Division's opinion is devoted to an evaluation of the State's asserted justification for its mistrial motion and the determination that these reasons were neither legally sufficient nor manifestly necessary to require termination of the trial, as required by the New Jersey statute. *Id.* at 13b to 16b.

It is thus apparent from the "four corners of the opinion" that New Jersey Appellate Division's decision to bar the retrial of Respondent is grounded upon "bona fide, separate, adequate and independent" New Jersey statutory grounds, namely *N.J.S.A.* 2C:1-9. *Michigan v. Long*, 463 U.S. 1032, 1040, 1041 (1983). Consequently, any decision rendered by this Court contrary to the New Jersey court's would amount to nothing more than an advisory opinion, since the same judgment would be rendered by the New Jersey court even after this Court articulated its view of how federal double jeopardy principles might apply to this case. *See Herb v. Pitcairn*, 324 U.S. 117, 125, 126 (1945). By virtue of the limitations this Court has imposed on its own jurisdiction,

then, the State's Petition for a Writ of Certiorari must be denied.

In its Petition, the State constantly stresses that the court below ignored federal decisions such as *Arizona v. Washington*, 434 U.S. 497 (1978), *Gori v. United States*, 367 U.S. 364 (1961), and *United States v. Dinitz*, 424 U.S. 600 (1976), in reaching its conclusion that the retrial of defendant is barred. *See Pet. Brief* at pp. 6, 7, 19, 21, 28. The State is correct in this conclusion; nowhere in the opinion below are these cases mentioned. What the State utterly fails to appreciate, however, is that all these federal decisions were ignored for the simple reason that the case was being decided under the controlling state statute, *N.J.S.A.* 2C:1-9, and not under federal constitutional principles. Indeed, the absence of citation by the court below to any controlling federal cases makes it clear that the Appellate Division's decision is not premised primarily on federal law, and the state court did not feel "compelled by what it understood to be federal constitutional considerations "in construing its statute as it did. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). *See Michigan v. Long*, *supra* at 1040-41.

For these reasons, then, this Court lacks the jurisdiction to hear and decide this case, and must therefore deny the State's Petition for a Writ of Certiorari.

II. EVEN WHEN JUDGED BY FEDERAL DOUBLE JEOPARDY PRINCIPLES, THE DECISION BELOW DOES NOT CONFLICT WITH THOSE PRINCIPLES OR WITH ANY DECISIONS OF THIS COURT OR THE COURTS OF APPEALS.

While it is the position of Respondent, as more fully set forth in Point I above, that the decision of the court below barring the retrial of Respondent was based upon the New Jersey court's interpretation and application of its state statutory standards, even if the facts of this case are judged by federal double jeopardy principles, the decision in no way conflicts with these principles or with extant decisions of this Court or the courts of appeal applying these principles. Consequently, there is no reason for this Court to exercise its discretion in favor of the Petition filed by the State of New Jersey.

The primary thrust of the State's Petition is that the decision below conflicts with the decisions of this Court in *Arizona v. Washington*, 434 U.S. 497 (1978), *Gori v. United States*, 367 U.S. 734 (1961), and *United States v. Dinitz*, 424 U.S. 600 (1975), and with the courts of appeals decisions in *United States v. Pridgeon*, 462 F.2d 1094 (5th Cir. 1972), and *United States v. Sedgwick*, 345 A.2d 465 (D.C. App. 1975), cert. den. 425 U.S. 966 (1976). Analyses of these cases demonstrates, however, that they are clearly distinguishable from the case at hand and, in most instances, also lend support to the decision of the court below.

In *Arizona v. Washington*, *supra*, this Court determined that the Double Jeopardy Clause did not bar retrial of the defendant where the prosecution's motion for a mistrial was necessitated by defense counsel's presentation of "improper and highly prejudicial evidence before the jury" in his opening statement. 434 U.S. at 515. In so ruling, however, the Court made it clear that the prosecution must shoulder the "heavy" burden of demonstrating a "high degree" of necessity for the mistrial before the bar of double jeopardy would be relaxed. *Id*. at 506. And retrial was held never to be permissible where the "prosecutor requests a mistrial in order to buttress weakness in his evidence." *Id*. at 507.

The factual circumstances giving rise to the State's motion for a mistrial in the case at hand are a far cry from the situation in *Arizona v. Washington*. Here, there was absolutely nothing improper or prejudicial in defense counsel's opening remarks to the jury, which merely made reference to the fact that there had been a prior juvenile court proceeding without going into any of the details of that hearing. Indeed, the trial court held that there was "not...any misconduct by the defense.... absolutely not." *Pet. App. C* at 8c. Furthermore, as the court below aptly pointed out, "the jury inevitably would learn of [the prior proceeding] in the course of the trial", and the State itself fully intended to present the jury with the in-court identification made during that proceeding. *Pet. App. B* at 15b, 8b - 9b.

It is also obvious, as the court below found, that the prosecutor's motion for a mistrial was motivated by the desire "to buttress weakness in his evidence", *Arizona v. Washington*, *supra* at 507, after his case had "turned sour" by the adverse evidential ruling. *Pet. App. B* at 16b. Instead of accepting the trial court's offer of a stay to allow an immediate appeal of the evidential ruling, the prosecutor elected to terminate the trial, thereby depriving defendant of his right "to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States v. Jorn*, 400 U.S. 470, 486 (1971).

Under these circumstances, it is apparent that the State has failed to shoulder the "heavy" burden of demonstrating a "high degree" of necessity for its mistrial motion, and consequently there is no reason whatsoever to relax the bar of double jeopardy. *Arizona v. Washington, supra* at 506.

Petitioner's reliance on *United States v. Dinitz*, *supra*, is totally misplaced. There it was the defendant who sought and was granted a mistrial after his lead counsel had been expelled from the trial because of repeated misconduct. In ruling that the Double Jeopardy Clause did not bar retrial, this Court emphasized that where a defendant requests a mistrial, "different considerations obtain", and defendant's motion will be deemed a waiver of the double jeopardy protection unless it can be shown that the mistrial application was provoked by bad faith conduct on the part of the judge or prosecutor. 424 U.S. at 607, 611.

Here, in contrast to the situation in *Dinitz*, it was the State which moved for a mistrial and, consequently, the waiver rationale of *Dinitz* is totally inapplicable to the instant matter. *See United States v. Jorn*, supra at 485; *Oregon v. Kennedy*, 456 U.S. 667, 673-74 (1982).

Petitioner's reliance on *Gori v. United States*, supra, is likewise misplaced. In *Gori* it was held that the Double Jeopardy Clause did not bar retrial because the trial court's sua sponte mistrial order was the "product of the trial judge's extreme solicitude--an over-eager solicitude, it may be--in favor of the accused." 367 U.S. at 367. In the instant matter the mistrial was neither sought nor granted to protect defendant's right to a fair trial, but rather to allow the State to start anew after the adverse evidential ruling. *Gori* makes it clear that the declaration of a mistrial which affords the prosecution a more favorable opportunity to convict will bar retrial of the defendant. *Id.* at 369.

The factual circumstances in *United States v. Pidgeon*, supra, make it clearly distinguishable from the case at bar. In *Pidgeon* the court declared a mistrial when it was discovered that a juror had engaged in a conversation with a defense witness during the morning recess and with defendant's wife and daughter-in-law during the lunch break. The Fifth Circuit held that the Double Jeopardy Clause would not bar retrial in these circumstances because "it was the indiscretions of defendant's

witnesses and relatives which prompted the mistrial." 462 F.2d at 1096. (emphasis the Court's)

As the trial court below clearly found, in this case there was absolutely no misconduct, indiscretions or other action on the part of the defense which necessitated the State's mistrial motion. *See Pet. App. C* at 8c. Indeed, the trial court initially ruled outside the presence of the jury that defendant could inform the jury that the State's principle witness had been found incompetent. As the New Jersey Appellate Division noted in its opinion, the trial judge "could not simultaneously have believed that the [evidence] ruling was correct and that there was a 'manifest necessity' to grant a mistrial because the ruling was wrong." *Pet. App. B* at 16b, fnt. 4.

In *United States v. Sedgwick*, *supra*, a sua sponte mistrial was declared after it was discovered, near the end of the government's case, that the prosecution had inadvertently neglected to provide defendant with a police report which identified an individual who had bragged of committing the assault with which defendant was charged. 345 A.2d at 467. Before declaring the mistrial, however, the trial court held two days of hearings into the circumstances of the report and its follow-up by the police, and then suggested a further continuance to allow the defense to follow-up on this lead through an out-of-court investigation. *Id*. at 472, 473. Defense counsel rejected this suggestion because of other trial commitments, *Id*. at 472,

and insisted on dismissal of the indictment under the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963). 345 A.2d at 468.

The *Sedgwick* court, in what it described as a "close question", *Id.* at 468, declined to bar the retrial of defendant because the decision to declare a mistrial was for the purpose of insuring that the defendant received a fair trial.

> Plainly, the trial court's decision to discharge the jury was not calculated to help the prosecution in any respect, but to provide the defendant with information which might have strengthened a potential defense of mistaken identity.
>
> 345 A.2d at 472.
> [footnote omitted.]

In so deciding, the court noted that even if a mistrial is not motivated by any desire to assist the prosecution, if it nonetheless has this impact, double jeopardy will bar a retrial. *Id.* at 472, fnt. 4, *citing United States v. Bristol*, 325 A.2d 183 (D.C. App. 1974).

The contrast between *Sedgwick* and the case at hand is apparent. Here, the mistrial was not declared for the purpose of protecting Respondent's right to a fair trial, but rather was sought by the prosecution because its case had "turned sour" by the adverse evidential ruling which seriously undermined the credibility of its key witness. And here it was the prosecution which was offered the opportunity of an immediate appeal to overturn this evidential ruling, but it unaccountably chose instead to press again for a mistrial.

In sum, all of the cases which Petitioner contends are in conflict with the decision below are either easily distinguishable from the case at hand and/or tend to support the Appellate Division's ruling. Consequently, there exists no basis whatsoever for this Court to exercise its discretion in favor of the Writ sought by Petitioner. See Rule 10 of the Rules of the Supreme Court of the United States.

Furthermore, even if this Court were to consider the merits of the State's argument, it is apparent that under federal double jeopardy standards the State has utterly failed to satisfy its "heavy" burden of demonstrating a "high degree" of necessity for seeking the mistrial. *Arizona v. Washington*, *supra* at 506. When the grounds for the State's motion are examined, it becomes clear, as the court below found, that these grounds were nothing more than a pretext for the State to start over after its case had "turned sour" by virtue of the adverse evidential ruling. *Pet. App. B* at 16b. As *Arizona v. Washington*, *supra* at 507, unequivocally declares, retrial of a defendant will never be permissible where the "prosecutor requests a mistrial in order to buttress weakness in his evidence."

The first ground for a mistrial argued by the State involved the trial court's statement during jury selection that the jury would "be satisfied as to the explanation of the [13 year] delay" in bringing the defendant to trial. As soon as this remark was made, it was brought to the attention of the trial court, which then immediately cured it by explaining to the jury that neither

the State nor the defendant was required to justify the delay and the jury should not consider it. The trial court even questioned the jury to make sure it understood this and, being satisfied with the jury's response, then asked the prosecutor if the instruction "covers it". The prosecutor responded affirmatively, saying "Thank you, your Honor," and the issue was laid to rest.

The second ground on which the state premised its mistrial motion was even more innocuous than the first. In preliminary instructions to the jury before opening statements, the trial court reminded the jurors that they were the "judges of the facts" and urged them to pay strict attention to the testimony and evidence. In so doing, the court may have implied that it might not allow portions of the trial testimony to be read back to them during deliberations. The prosecutor did not object to this statement, but merely brought it to the trial court's attention. The trial judge assured the prosecutor that he would correct any mistaken impression he may have left with the jury when he gave his final charge. The prosecutor noted for the record his satisfaction with this procedure and sought no curative instruction.

For the State to contend that this event lends support to its mistrial motion is absolutely ludicrous, especially since the rereading of testimony during jury deliberation is always within the discretion of the trial court. Indeed, the State should have welcomed the trial court's remarks to the jury, since they

emphasized the jury's need to pay close attention to all testimony and evidence throughout the trial.

The third ground cited by the State as a basis for its mistrial motion was defense counsel's passing remark to the jury in his opening that there had been a prior juvenile hearing in the matter 13 years before, during which the State's key witness, Samuel Wilson, had testified. Nothing more about the nature of this hearing or the witness' testimony was said, and this was the very last statement which defense counsel made to the jury before the trial was aborted by the State.

As the court below aptly pointed out, this passing reference to the prior hearing and the fact that the State's witness had testified there in no way prejudiced the State, because it was inevitable during the course of the trial that the full particulars of Samuel Wilson's "contradictory and nonsensical testimony" at this hearing was going to come out. *Pet. App. B* at 15b. In fact, the State acknowledged at sidebar that it fully intended to introduce into evidence the identification Samuel had made during this hearing. *Id.* at 8b - 9b. Since defense counsel's remarks regarding the prior hearing were fully in keeping with the purpose of an opening statement--to preview the evidence to be introduced at trial--defense counsel's reference to the fact of a prior hearing created no grounds whatsoever, let alone a high degree of necessity, for the State to seek a mistrial.

The fourth ground which the State asserts as support for its mistrial motion was the evidential ruling allowing the prior determination of Samuel's competency as a witness to be presented to the jury. This ruling, however, in no way affected the jury's impartiality or ability to fairly judge the case because it occurred at a sidebar conference and the information regarding Samuel's competency never reached the ears of the jurors. Thus, as the court below pointedly noted, "the jurors could not have formed 'preconceived ideas or notions' from the fourth event because it occurred outside their presence." *Id.* at 13b.

Furthermore, when the prosecutor took sharp exception to this evidential ruling, the trial court informed the prosecutor that it would grant a stay of the trial to allow an immediate appeal of the ruling. The trial court even went so far as to suspend defense counsel's opening and grant a recess so the prosecutor could consider his next move. Despite this accommodation, the State chose not to appeal but instead to seek the extraordinary remedy of a mistrial. Since there was absolutely no need for the State to resort to this inappropriate remedy, it is apparent, as the court below found, that "the State wanted to start over because its case had 'turned sour' or, for some undisclosed inexcusable reason it was not able to proceed." *Id.* at 16b.

In sum, there was absolutely nothing prejudicial occurring in the presence of the jury which created the "high degree" of necessity required for the State to demand a mistrial. *Arizona*

v. Washington, *supra* at 506. The events of which the State complains were simply everyday occurrences in the trial courts of this country. The minor misstatement by the trial court regarding the reasons for delay was immediately corrected to the prosecutor's satisfaction. The only event which could have in any way prejudiced the State was the adverse evidential ruling, but the jury was not privy to this and thus it had no effect on their ability to fairly decide the case. However, the adverse evidential ruling is extremely significant because it was the event which immediately triggered the State's mistrial motion. Clearly this ruling constituted a set-back to State's case, and it was because of this that the State sought to abort the trial. But as *Arizona v. Washington*, *supra* at 507, and *Gori*, *supra* at 369, teach, when the declaration of a mistrial is used to afford the prosecution a more favorable opportunity to convict or to buttress weakness in its evidence, Fifth Amendment double jeopardy principles will always bar a retrial.

In its Petition the State also contends that Respondent waived his right to object to the termination of the trial by not again arguing in opposition to the State's renewal of its mistrial motion after the recess. This argument misses the mark for three reasons.

First and foremost, the ruling of the court below that Respondent had neither consented to nor waived objection to the mistrial is clearly based solely upon its interpretation and application of *N.J.S.A.* 2C:1-9d(1), since that is the only

authority cited by the court in making this determination. *See Pet. App. B* at 2b, 13b. Its decision is, therefore, a matter of state law and beyond the jurisdiction of this Court to decide. *See* Point I *supra*.

Secondly, counsel for Respondent had already evidenced his opposition to the State's first mistrial motion made prior to the recess, and that motion had been summarily denied by the trial court. The court below therefore properly found that there was "nothing in the record to suggest that Respondent's attorney had withdrawn his opposition to the mistrial. His waiver of the opportunity to express his opposition again certainly was not a waiver of the opposition he had previously expressed." *Pet. App. B* at 13b.

Finally, after the court had indicated it was inclined to grant the State's motion, but before the jury was called in and discharged, defense counsel brought to the State's and the trial court's attention the fact that the mistrial might effectively bar the retrial of Respondent. Despite this, the State did not seek to withdraw its motion, but instead again argued in support of it, and the trial court affirmed its mistrial ruling.

Under these circumstances, it is obvious that Respondent neither consented to nor waived his right to object to the termination of the trial, as required by the controlling statute, *N.J.S.A.* 2C:1-9d(1).

The remainder of the State's Petition is spent either arguing that the incompetency ruling was inadmissible or

contending that the interests of justice demand that Respondent be retried.

Little need be said with regard to the evidence ruling for two reasons. First, since the incompetency finding was never entered into evidence or heard by the jury, its admissibility or inadmissibility is academic and unrelated to the issues for which the State seeks the Writ. Secondly, the propriety of the trial court's ruling on the admission of this evidence is a state law issue not subject to review by this Court. *See Pet. App. B* at 15b, fnt. 3 and Point I *supra*.

With respect to Petitioner's "interests of justice" argument, this is nothing more than pure rhetoric. The New Jersey Legislature has enacted statutory standards which govern the circumstances under which its trial courts may properly terminate a criminal trial without barring the retrial of the defendant. *See N.J.S.A.* 2C:1-9. The unanimous panel of the New Jersey Appellate Division has determined that those standards were not met in this case. The New Jersey Supreme Court has found no basis to even consider this determination, let alone overturn it. *See N.J. Court Rule* 2:12-4. Thus, the three principal lawmakers in New Jersey, its Legislature, its Appellate Division, and its Supreme Court, have all determined that the interests of justice and due process of law bar the retrial of the Respondent.

Contrary to the State's assertion, the decision of the court below is not based on a technicality or a situation where form

has been placed over substance. Rather, the decision below is firmly grounded on a proper and just interpretation and application of statutory standards which have been in place in New Jersey for 12 years, and which govern all criminal trials in New Jersey, be they petty larceny or murder prosecutions. There is absolutely nothing in the statutory history of this legislation or, indeed, in the Fifth Amendment to the United States Constitution, which creates a special exception for homicide cases, as the State proposes.

What the State fails to either acknowledge or confront is the fact that it voluntarily elected to terminate the trial for improper and insufficient reasons after the jury had been sworn. The State was in no way forced or compelled to do so by any circumstances beyond its control. By opting for a mistrial instead of accepting the trial court's offer of a stay pending appeal, the State forfeited its right to try Respondent again. No amount of rhetoric or hyperbole can change this fact, and it is the State, and not Respondent or "the system", must bear the consequences.

CONCLUSION

For the reasons expressed above, it is respectfully submitted that this case presents no federal issue whatsoever, let alone an important constitutional issue regarding the application of the Double Jeopardy Clause. Furthermore, even under federal double jeopardy principles, there was no necessity at all, let alone the "high degree" of necessity required by *Arizona v. Washington*, for the State to seek a mistrial. The State's mistrial motion was sought in order to afford it a more favorable opportunity to convict after its case had suffered a serious set back by the adverse evidential ruling. The Double Jeopardy Clause will always bar retrial in these circumstances, as this Court has often held. Since there is no need for additional precedent on this point, the Petition of the State of New Jersey for a Writ of Certiorari should be denied.

Respectfully submitted,

BROWN & CONNERY
360 Haddon Avenue
P.O. Box 539
Westmont, New Jersey 08108
(609) 854-8900

By: Warren W. Faulk
Warren W. Faulk

Dated: January 19, 1990